

November 2006

## Trading the Privacy Right: Justice Alito's Dangerous Reasoning on Privacy Rights

Peter A. Meyers

Joshua Osborne Klein

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/sjsj>

---

### Recommended Citation

Meyers, Peter A. and Klein, Joshua Osborne (2006) "Trading the Privacy Right: Justice Alito's Dangerous Reasoning on Privacy Rights," *Seattle Journal for Social Justice*: Vol. 5 : Iss. 1 , Article 21.

Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol5/iss1/21>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Seattle Journal for Social Justice by an authorized editor of Seattle University School of Law Digital Commons. For more information, please contact [coteconor@seattleu.edu](mailto:coteconor@seattleu.edu).

## Trading the Privacy Right: Justice Alito's Dangerous Reasoning on Privacy Rights

---

Peter A. Meyers<sup>1</sup> & Joshua Osborne-Klein<sup>2</sup>

The primary role of the judiciary is to protect rights guaranteed by the Constitution.<sup>3</sup> This role becomes especially important when such rights conflict with majoritarian whim.<sup>4</sup> The United States Supreme Court is the ultimate authority on interpreting the Bill of Rights and is therefore the body responsible for ensuring that individual rights are protected.<sup>5</sup> Accordingly, changes in the composition of the Court can have consequences on how our society protects individual rights. This concern crystallized on October 31, 2005, when Samuel A. Alito, Jr., was nominated by President George W. Bush as an associate justice on the Supreme Court.<sup>6</sup> Alito was confirmed by the United States Senate on January 31, 2006, thus becoming the 110th Supreme Court justice.<sup>7</sup> Alito replaced retiring Justice Sandra Day O'Connor, who was often the critical "swing vote" on the Court.<sup>8</sup>

During his confirmation hearing, Alito expressly recognized the role of the judiciary as protector of individual rights. He explained as follows:

there's a reason why they gave federal judges life tenure, and that is so . . . they will not decide cases based on the way the wind is blowing at a particular time . . . when people may lose sight of fundamental rights, the judiciary stands up for fundamental rights; that it is not reluctant to stand up for the unpopular and for what the court termed insular minorities; that the judiciary . . . enforces the Constitution and laws in a steadfast way . . .<sup>9</sup>

However, as it stands now, Justice Alito "has never taken a position more receptive to individual privacy or security than the position taken by his colleagues on the same panel."<sup>10</sup> Indeed, despite his rhetoric during his

confirmation hearing, Justice Alito's opinions as a judge for the Third Circuit Court of Appeals<sup>11</sup> illustrate a willingness to dilute individual rights. Moreover, these opinions serve as indicators of how he will likely analyze individual rights cases as a Supreme Court justice.<sup>12</sup>

As a justice, Alito will have ample opportunity to further shape the right to privacy. He will likely rule on privacy cases with issues concerning abortion,<sup>13</sup> gay marriage,<sup>14</sup> torture,<sup>15</sup> and warrantless electronic eavesdropping,<sup>16</sup> among others. The constitutional jurisprudence in these cases will invariably require Justice Alito and the other members of the Court to balance the individual interest in privacy against the broader governmental interests of efficient law enforcement and preservation of the health and safety of the people.

Alito's career, however, has almost always focused on advocating in favor of broad governmental interests that often contravene interests in personal privacy. Before becoming a judge, Alito represented the federal government as assistant to the Solicitor General of the United States and in the Department of Justice's Office of Legal Counsel.<sup>17</sup> Just before being elevated to the federal bench, Justice Alito was the U.S. Attorney for New Jersey, where he was best known for prosecuting white-collar, environmental, drug trafficking, and organized crime.<sup>18</sup> As a government lawyer, Alito has not argued for more liberal privacy rights.<sup>19</sup> This kind of career focus has informed his reasoning as a circuit court judge and will continue to inform his reasoning as a Supreme Court justice.

In this article, we attempt to determine how Justice Alito will influence the Supreme Court's role as protector of individual rights by looking at his decisions regarding privacy rights when he was a circuit court judge. In Part I of this article, we explore Justice Alito's treatment of the Fourth Amendment right to be free from unreasonable searches and seizures. In Part II, we analyze cases in which Alito has considered the Fifth Amendment right to be free from self-incrimination and the right to counsel. In Part III, we have the opportunity to discuss a Sixth Amendment

case in which Justice Alito, as a member of the Court, wrote the dissent. In Part IV of this article we discuss cases in which Justice Alito has commented on the broader right to privacy as articulated by the Supreme Court in *Griswold v. Connecticut*. In Part V, we conclude that our examination of Alito's jurisprudence on the Third Circuit reveals Justice Alito's willingness to sacrifice individual rights in order to achieve broad societal goals. Thus, we predict that he will weaken the Supreme Court's ability to protect individual rights, thereby ameliorating the Supreme Court's role as the protector of the interests of individuals. With Justice Alito now on the bench, there will be no relief for individuals seeking to protect their privacy interests.

#### I. FOURTH AMENDMENT

The Fourth Amendment is one of the most important components of the right to privacy. It provides to people the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and requires warrants to be based "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."<sup>20</sup> The rights afforded by the Fourth Amendment are unquestionably fundamental; however, these rights often conflict with the governmental interest in efficient law enforcement. Unfortunately, because of the ambiguous wording of the Fourth Amendment, judges have considerable discretion in determining what police conduct is "unreasonable" and when a warrant affidavit is sufficiently "particularized." Justice Alito will take advantage of these ambiguities to weaken the individual rights protected by the Fourth Amendment and promote the majoritarian interest in efficient law enforcement.

*A. Justice Alito Will Weaken the Fourth Amendment by Broadly Interpreting the Scope of Search Warrants So As To Justify Questionable Law Enforcement Practices.*

Interpretation of the scope and adequacy of search warrants is a topic in which the malleable Fourth Amendment standard is subject to exploitation. Justice Alito has strained logic to interpret search warrants in ways that justify questionable searches. For example, in *United States v. Stiver*, Alito considered whether the police could answer a telephone in a private residence while they were conducting a search of the residence pursuant to a warrant.<sup>21</sup> The search warrant in *Stiver* authorized the police to search for and seize “all drug paraphernalia.”<sup>22</sup> Alito concluded that the “search” of incoming telephone calls was authorized under this provision of the warrant because the telephone constituted “paraphernalia.” Alito reasoned as follows:

In ordinary usage, the term “paraphernalia” is defined to mean “equipment [and] apparatus . . . used in or necessary for a particular activity” . . . . In light of the fact that the officers had ample cause to believe that the defendant had been using the apartment to make heroin sales, including sales to individuals who wanted the drug for personal use, the officers had an entirely reasonable basis for concluding that the defendant’s telephone was a piece of “equipment” or “apparatus” that was “used in or necessary for [the defendant’s] particular activity,” namely selling drugs to users and others from his residence.<sup>23</sup>

At a minimum, it is hypertechnical to define the term “paraphernalia” to include a telephone used to make drug deals. Even the federal government, which has a critical interest in efficient law enforcement, admits that the ordinary usage of the term “drug paraphernalia” is more limited.<sup>24</sup> The *Stiver* decision illustrates Justice Alito’s willingness to contort the plain language of a warrant so that it satisfies the Fourth Amendment requirement of “particularity.”<sup>25</sup>

Justice Alito's dissent in *Baker v. Monroe Township*<sup>26</sup> exemplifies an even more dubious interpretation of a search warrant in favor of law enforcement interests. Specifically, Alito strained logic to justify a search that had all the markings of excessiveness. In *Baker*, a father and mother, accompanied by their two minor children, were on their way to their adult child's apartment for dinner.<sup>27</sup> As the Bakers approached the apartment, several officers began a drug raid on the same apartment, ordered the family to "get down," held the family at gun point, left the family handcuffed for twenty-five minutes, and searched both Mrs. Baker and her minor son.<sup>28</sup> The drug raid was authorized by a form warrant that "contained only an identification of the premises to be searched and mentioned nothing about any persons" because "no one ever bothered to complete [the warrant] to include specified persons as well as premises."<sup>29</sup> In dissent, Alito attempted to interpret the flawed warrant so as to justify the search of the family members:

[The search warrant] commanded Armstrong and other defendants "to search the (x) premises described below (x) person(s) described below (x) vehicle described below. . . . [A]n apartment located in an apartment building at 607 South Main Street . . ." To my mind, by far the best interpretation of these provisions of the warrant is that they authorized a search of, not only the premises of the apartment, but also any persons found on the premises. . . . Since paragraph 4 is supposed to describe "premises," "persons," and "vehicles," but expressly refers only to the premises of the apartment, the most reasonable interpretation is that the warrant authorized a search of the premises and any persons or vehicles found on the premises.<sup>30</sup>

The majority in *Baker*, authored by Senior Circuit Judge Gibson, directly criticized Alito's reasoning:

The dissent engages in a lengthy interpretation of the warrant to find authorization for a search of persons found on the premises. . . . This elaborate interpretation and analysis and the length to which the dissent goes in developing it simply point up the inadequacy of

the warrant to describe any person generally or specifically. Having said as much, we need not speculate further as to whether the dissent's interpretation would cover not only persons found on the premises, but those outside the premises and on the sidewalk and steps leading into it. It is also evidence that the dissent makes its interpretation and bases its analysis on the facts taken in the light most favorable to the party moving for summary judgment rather than the non-movant, contrary to the constraints we have referred to that guide us in reviewing an order granting summary judgment.<sup>31</sup>

Alito's dissent in *Baker* and the majority opinion in *Stiver* are examples of his willingness to reach beyond common sense in interpreting a search warrant to justify an expansion of law enforcement power at the expense of individual liberty.

Further limiting the individual's right to privacy in favor of law enforcement interests, Alito has argued for limiting the role of the magistrate in the search warrant process. For example, in *United States v. Hodge*, police arrested Hodge on the street after he discarded two bags of crack cocaine while fleeing from the police.<sup>32</sup> Subsequent to the arrest, the police sought a warrant to search Hodge's home.<sup>33</sup> In the affidavit, an officer averred that "the quantity of cocaine involved in [Hodge's] attempted transaction and the circumstances surrounding his arrest indicated that Hodge was possessing the crack cocaine with an intent to distribute it."<sup>34</sup> The officer claimed that "[b]ased upon [his] training and experience," he knew that "persons involved in the receipt and distribution of controlled substances commonly keep within their residences evidence of their criminal activity."<sup>35</sup> In considering whether this affidavit was sufficient to support probable cause, Alito admitted that there was "no direct evidence that drugs or drug paraphernalia would be located in Hodge's home."<sup>36</sup> Nevertheless, Alito stretched the understanding of probable cause to uphold the validity of the warrant based on deference to police expertise of drug-dealer activities:

Initially, the facts surrounding Hodge's arrest suggest that he was an experienced drug dealer who was operating a drug business. . . . All these facts combine to suggest that Hodge was an experienced and repeat drug dealer who would need to store evidence of his illicit activities somewhere. . . . It is reasonable to infer that a person involved in drug dealing on such a scale would store evidence of that dealing at his home.<sup>37</sup>

This reliance on law enforcement "expertise" to establish probable cause in the absence of direct evidence gives substantial power to law enforcement agents to obtain warrants without the normal judicial oversight required by the Fourth Amendment.

Alito applied the same dangerous reasoning in his dissent in *United States v. Zimmerman*.<sup>38</sup> In *Zimmerman*, the police searched the defendant's house pursuant to a warrant and found several images of child pornography.<sup>39</sup> The majority held that the warrant was not supported by probable cause because the warrant application "did not contain any information indicating that Zimmerman ever possessed child pornography." Furthermore, the only evidence that the defendant possessed adult pornography was one clip of adult pornography allegedly obtained several months before the search, and thus was stale.<sup>40</sup>

Alito dissented, arguing the affidavit supporting the search warrant established probable cause. The affidavit stated that the officer "had been informed by a postal inspector with lengthy experience investigating crimes involving the sexual victimization of minors that persons with a sexual interest in children often collect and keep sexually related images of minors for lengthy periods and often use pornography depicting adults to assist in victimizing minors."<sup>41</sup> Thus, Alito argued that probable cause was established by evidence of "incidents alleged in the affidavit show[ing] that the defendant had a sexual interest in minors and that he had used sexual materials . . . as part of his course of conduct."<sup>42</sup> Accordingly, as in the *Hodge* majority, Alito's dissent in *Zimmerman* relied on generalized notions of criminal conduct as explained by law enforcement agents—not



particularized suspicion as required by the Fourth Amendment—to argue that a search warrant was supported by probable cause. Such reasoning is contrary to Fourth Amendment jurisprudence, to which Alito has paid only lip service.<sup>43</sup>

*B. Alito Will Likely Expand the Circumstances In Which Warrantless Searches and Seizures Are Permitted Under the Fourth Amendment.*

In addition to broadly construing the scope of search warrants, Alito has broadened the circumstances in which warrantless searches and seizures are allowed. For example, in *United States v. Kithcart*, Justice Alito considered whether police were justified in stopping an automobile and then arresting and searching the occupants without a warrant.<sup>44</sup> In *Kithcart*, an officer received three reports of an armed robbery within an hour.<sup>45</sup> The reports described the alleged perpetrators as “two black males in a black sports car ...possible Camaro.”<sup>46</sup> Approximately ten minutes after receiving the final report, near the sites of the robberies, the officer stopped a black Nissan that appeared to contain a single African-American male.<sup>47</sup> After stopping the car, the officer observed Kithcart, a second African-American male occupant.<sup>48</sup> When Kithcart challenged the stop, the district court ruled that the police had probable cause based on the direction, timing, location, and description of the vehicle.<sup>49</sup> The district court noted the discrepancy in the number of occupants in the vehicle but reasoned that because the officer had not seen any other African-American men driving cars since the robbery, the stop was reasonable.<sup>50</sup>

To his credit, Justice Alito disagreed with the district court’s holding that the stop was based on probable cause. Alito held that

the mere fact that Kithcart is black and that the perpetrators had been described as two black males is plainly insufficient. . . . [A]rmed with information that two black males driving a black sports car were believed to have committed three robberies in the area some relatively short time earlier, [the officer] could not

justifiably arrest any African-American man who happened to drive by in any type of black sports car.<sup>51</sup>

However, despite rejecting the use of racial profiling as a way to establish probable cause, Alito remanded for a determination of whether the officer “had a reasonable suspicion sufficient to warrant an investigative stop” under *Terry v. Ohio*.<sup>52</sup> This holding sparked dissent by Judge McKee, who would have ruled as a matter of law that the officer did not have reasonable suspicion to stop the vehicle “solely because it was a black sports car driven by an African American male near Bristol Township shortly after she learned that two African American males had committed a series of armed robberies in that area.”<sup>53</sup> This contrast of opinion illustrates, at a minimum, Justice Alito’s willingness to accept “racial profiling” as a reasonable basis for a *Terry* stop. Such an interpretation of reasonableness is a threat to protection of minority rights.

Similarly, in *Mellot v. Heemer*,<sup>54</sup> Justice Alito stretched logic to affirm that a seizure conducted by police was reasonable even though it amounted to a gross violation of the Fourth Amendment. In *Mellott*, one of the plaintiffs asserted that he had been seized in violation of the Fourth Amendment when police used him as a “human shield” by making him walk into a residence in a “potentially dangerous situation” with a gun pressed to the plaintiff’s back.<sup>55</sup> This case was an appeal of summary judgment for defendants, so the court should have viewed the facts in the light most favorable to the plaintiff.<sup>56</sup> Despite the deferential standard, Alito affirmed the summary judgment for defendants “because the evidence in the summary judgment record cannot support a finding that the plaintiff Jackie Wright was seized or that a reasonable officer could not have believed that Wright was not seized.”<sup>57</sup> In reaching this conclusion, Alito noted the following:

There is no evidence that the marshals told [the plaintiff] that he was not free to leave. Moreover, Wright did not state during the deposition that he ever told the marshals that he wished to leave or

to remain outside Kirk's house. Nor did he testify that the marshals ever told him that he was not free to leave or to stay outside the house.<sup>58</sup>

Thus, disregarding the fact that, according to the complaint, the plaintiff was forced to enter into a potentially dangerous situation with a gun placed to his back, Alito held that "the summary judgment record is insufficient to convince a reasonable fact finder that a reasonable person in Wright's position would have felt that he was not free to leave the scene or to stay outside the house."<sup>59</sup> Commenting on the evidence that the plaintiff was forced into the house at gunpoint, Alito stated that because the plaintiff was "in the lead and with the marshals following close behind with their guns drawn, it would not be surprising for Wright to feel a gun touch his back."<sup>60</sup> This conclusion not only disregards the deferential standard appropriate when reviewing appeals of summary judgments, it also simply departs from rationality. It is highly questionable that any individual would "feel free to leave" when he is being held at gunpoint by police. Indeed, such police conduct would seem to constitute a quintessential seizure under the Fourth Amendment.

*C. Justice Alito Has Broadly Interpreted Exceptions to the Warrant Requirement and Limited Remedies for Fourth Amendment Violations.*

Justice Alito has attacked the Fourth Amendment from both ends. While broadly interpreting what constitutes a "reasonable" search and seizure in cases such as *Mellott*, discussed above, Alito has simultaneously expanded the exceptions to the warrant requirement and limited remedies available for Fourth Amendment violations. For example, in *Bolden v. Southeastern Pennsylvania Transportation Authority*,<sup>61</sup> one of Justice Alito's early opinions for the Third Circuit, he broadened the circumstances in which a third party may consent to a warrantless search. In *Bolden*, the Southeastern Pennsylvania Transportation Authority appealed an award of compensatory damages to Russell Bolden based on an unconstitutional drug

test that resulted in Bolden's discharge from employment.<sup>62</sup> Alito noted that "compulsory, suspicionless drug testing of a person holding Bolden's job" would violate the Fourth Amendment.<sup>63</sup> However, adopting a novel concept of the consent exception, Alito found that Bolden had impliedly consented to the drug testing by his membership in the union. Alito held that

there are a variety of circumstances in which a third party may validly consent to a search or seizure . . . . [W]e believe that a union such as Bolden's may validly consent to terms and conditions of employment, such as submission to drug testing, that implicate employees' Fourth Amendment rights.<sup>64</sup>

Thus, Alito articulated a new rule for consent in the Third Circuit: "[I]f the union agrees, or if binding arbitration establishes, that the collective bargaining agreement impliedly authorizes drug testing, individual employees are bound by this interpretation unless they can show a breach of the duty of fair representation."<sup>65</sup> In so holding, Alito noted that "no court has held that the right to be free from drug testing is one that cannot be negotiated away . . . ."<sup>66</sup>

Alito's decision in *Bolden* implying that a union member could trade away a right, was not without controversy. In dissent, Judge Nygaard criticized Alito's majority, arguing that the reasoning "confuses the distinction between a reasonable and an unreasonable search or seizure."<sup>67</sup> Nygaard would have held that Bolden could not "have delegated complete authority to compromise a right that is the very touch-stone of the Bill of Rights and consecrated by generations of constitutional jurisprudence."<sup>68</sup> In criticizing the majority, Nygaard hits close to home by identifying a recurring theme in Alito's reasoning:

The majority seems to believe that the scope and nature of Fourth Amendment rights would depend on the legal framework of labor law . . . . I reject that importation into Fourth Amendment jurisprudence. The contours of the Fourth Amendment cannot be molded by a union to its utilitarian concept of fairness.<sup>69</sup>

Further hammering on this point, Nygaard explained the following:

Fourth Amendment rights are guaranteed to individuals. Unions do not have inherent actual authority to waive such constitutional rights; else individual rights would be sacrificed for some perceived collective good as unions negotiate to get economically related benefits for their members as a whole. *The Bill of Rights is predicated on the notion that minority or individual rights must be protected from assault by the majority.*<sup>70</sup>

Thus, as alluded to by Judge Nygaard in this articulate dissent, Alito's decision in *Bolden* offered early warning that Alito may not be committed to protection of individual rights, especially in the realm of Fourth Amendment privacy.

Alito also broadened the consent exception's application in the context of electronic eavesdropping. For example, in *United States v. Lee*, a defendant argued that a videotape showing the defendant illegally receiving money from a confidential police informant should have been suppressed under the Fourth Amendment.<sup>71</sup> The videotape was obtained by FBI agents who electronically monitored and recorded activities in the defendant's hotel room using equipment installed in the room by the FBI.<sup>72</sup> The agents did not have a warrant for the surveillance; rather, they relied on consent of the confidential informant.<sup>73</sup> Thus, the agents were instructed to use the monitoring equipment only when the informant was in the defendant's room.<sup>74</sup> Alito held that the video surveillance did not violate the Fourth Amendment, despite the absence of a warrant, because "[t]here was no evidence that conversations were monitored when [the informant] was absent [and] . . . the tapes do not depict anything material that [the informant] himself was not in a position to hear or see while in the room."<sup>75</sup>

The dissent in *Lee* rejected this reasoning, relying largely on Supreme Court indications in *Katz v. United States*<sup>76</sup> that "self-imposed restraint" by law enforcement agents "could not legitimize the warrantless seizure of Katz's conversations in the public telephone booth."<sup>77</sup> Indeed, it appears

that the *Katz* opinion expressly rejects the argument upon which Alito relied in the *Lee* majority opinion. In *Katz*, the Supreme Court noted the following:

It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end.<sup>78</sup>

Accordingly, the dissent in *Lee* argued that Alito erred because, while the Fourth Amendment does not protect information voluntarily confided to an informant, in things outside an informant's perception there remains a reasonable expectation of privacy.<sup>79</sup> Thus, noting that the surveillance equipment continued to transmit images when the informant was not in the room and the equipment had a different line of sight than that of the informant, the dissent would have held that the FBI agents' self-restraint was an insufficient safeguard under *Katz* and, therefore, the videotape should have been suppressed. Noting Alito's departure from the *Katz* decision, Judge McKee characterized Alito's *Lee* opinion as "gulp[ing] down the Fourth Amendment . . ."<sup>80</sup>

Justice Alito will find partnership on the Supreme Court in his quest to disparage the Fourth Amendment. In *Hudson v. Michigan*, the Court, with newly minted Justice Alito on it, faced the question of whether the exclusionary remedy is triggered by a violation of the "knock-and-announce" rule, which requires officers to knock-and-announce their

presence and wait a reasonable time before forcibly entering a private residence.<sup>81</sup> The *Hudson* majority ruled that the exclusionary remedy is not an available remedy for such a violation.<sup>82</sup>

In reaching this conclusion, the majority largely ignored the individual interests that the knock-and-announce rule was designed to protect. Justice Scalia, writing for a majority composed of Chief Justice Roberts and Justices Thomas, Kennedy, and Alito, recited three historical purposes for the knock-and-announce rule: (1) protection of human life and limb, (2) protection of property, and (3) protection of individual privacy by giving a resident “the opportunity to collect oneself before answering the door.”<sup>83</sup> Despite recognizing these interests, the Court found that other remedies—such as civil suits under 42 U.S.C. § 1983, internal discipline of law enforcement officers, and citizen review—served as sufficient deterrence for knock-and-announce violations.<sup>84</sup> Considering these available deterrents, the majority reasoned that application of the exclusionary rule to knock-and-announce violations was unjustified because the “substantial social costs” that affect “truth-seeking and law enforcement objectives” outweighed any benefit to the individual rights served by the rule.<sup>85</sup>

This deemphasis of individual liberty did not go unnoticed by Justice Breyer, who, joined by Justices Stevens, Souter, and Ginsburg, wrote a vigorous dissent. Noting inconsistency with prior application of the exclusionary rule, Justice Breyer argued that the majority opinion “represents a significant departure from the Court’s precedents” and “weakens, perhaps destroys, much of the practical value of the Constitution’s knock-and-announce protection.”<sup>86</sup> Justice Breyer relied on *Mapp v. Ohio*,<sup>87</sup> in which the Court reversed its prior decision in *Wolf v. Colorado*<sup>88</sup> and held that the exclusionary rule was applicable to the states because the other remedies the states had devised to address Fourth Amendment violations had proved “worthless and futile.”<sup>89</sup> In Justice Breyer’s opinion, the majority’s analysis was flawed because it had offered no proof that these same types of remedies are any less futile today than

they were when *Mapp* was decided.<sup>90</sup> Justice Breyer charged the majority with arguing that “*Wolf*, not *Mapp*, is now the law.”<sup>91</sup>

Justice Breyer also discussed the majority’s willingness to sacrifice individual liberties to promote efficient law enforcement. While conceding that there are social costs associated with the exclusion of evidence, Justice Breyer aptly pointed out that these same social costs “accompany *any* use of the Fourth Amendment’s exclusionary principle . . . .”<sup>92</sup> Thus, Justice Breyer accused the majority of bringing an assault “against the Fourth Amendment exclusionary principle itself.”<sup>93</sup> This condemnation of the majority’s opinion is consistent with critiques of Justice Alito’s Third Circuit jurisprudence.<sup>94</sup> Accordingly, *Hudson* serves as an indication that Justice Alito will continue in his quest of emphasizing law enforcement concerns to the detriment of individual liberty.

In addition to marginalizing the individual interests protected by the Fourth Amendment by broadening the exceptions to the warrant requirement, Alito has expanded the qualified immunity doctrine, which limits remedies available for Fourth Amendment violations. Qualified immunity bars lawsuits against individual police officers for violations of the Fourth Amendment so long as “reasonable officials in the defendants’ position at the relevant time could have believed, in light of what was in the decided case law, that their conduct would be lawful.”<sup>95</sup> In *Leveto v. Lapina*, the Third Circuit considered a section 1983 claim<sup>96</sup> arising out of a *Terry*-style frisk<sup>97</sup> of the wife of a doctor targeted by the IRS for investigation.<sup>98</sup> The wife was frisked in her home while she was “wearing only a nightgown.”<sup>99</sup> Alito recognized that a *Terry* frisk is only permitted “when, under the circumstances, an officer has a reasonable belief that the subject is armed and dangerous.”<sup>100</sup> Thus, Alito held that the frisk of the wife violated the Fourth Amendment because “under *Ybarra* her presence on the premises was not alone sufficient to justify the pat down.”<sup>101</sup>

However, while finding a Fourth Amendment violation, Alito held that the qualified immunity doctrine barred the Levetos’ section 1983 claim,



thus denying any relief for this constitutional violation.<sup>102</sup> Alito reasoned that “a reasonable agent could have believed that patting down Mrs. Leveto . . . was permitted by the Fourth Amendment.”<sup>103</sup> Thus, although (1) Mrs. Leveto was only connected to criminal activity through her husband, (2) there was no indication that her husband “was armed or that he even owned any firearms,”<sup>104</sup> and (3) Mrs. Leveto was wearing only a nightgown when she was frisked in her home, Alito held that the law enforcement agents could have reasonably believed that the frisk was permissible. Alito’s only justification for this holding was that “some of the lower court cases decided after *Ybarra* indicated a willingness to allow a frisk provided the person had a somewhat stronger link to the premises than *Ybarra* did to the bar where he was found.”<sup>105</sup> However, Alito does not cite a single case contravening the well-settled rule that officers need a reasonable suspicion that Mrs. Leveto was *armed and dangerous* before conducting a *Terry*-style frisk.<sup>106</sup> Only in James Bonds’ world, with a femme fatale like Pussy Galore, would such a conclusion be reasonable.<sup>107</sup>

Alito’s dissent in *Doe v. Groody*,<sup>108</sup> one of his most controversial opinions, further illustrates Alito’s quest to limit remedies for Fourth Amendment violations by giving expansive scope to the qualified immunity doctrine. In *Doe*, police officers were accused of illegally strip searching the plaintiffs, one of whom was a ten-year-old girl at the time of the search.<sup>109</sup> The officers argued that the strip searches were authorized by a search warrant; however, Judge Chertoff, writing for the majority, noted that the warrant did not list either plaintiff as persons to be searched.<sup>110</sup> The officers attempted to justify their departure from the warrant by arguing that the warrant should be read in light of an accompanying affidavit that requested permission to search “all occupants” of the residence.<sup>111</sup> Chertoff rejected this argument, holding that while “it is perfectly appropriate to construe a warrant in light of an accompanying affidavit,” the law is clearly established that “the warrant must expressly incorporate the affidavit . . . .”<sup>112</sup> The majority noted that “[w]ere we to adopt the officers’ approach to

warrant interpretation, and allow an unincorporated affidavit to expand the authorization of the warrant, we would come dangerously close to displacing the critical role of the independent magistrate.”<sup>113</sup>

Alito, dissenting, would have held that the officers who conducted the warrantless strip search of the ten-year-old plaintiff were entitled to qualified immunity. Alito accused the majority of “employ[ing] a technical and legalistic method of interpretation that is the antithesis of the ‘commonsense and realistic’ approach that is appropriate.”<sup>114</sup> Alito reasoned that because “the face of the warrant [did] not unambiguously restrict the persons to be searched,” the court should hold “that the warrant did in fact authorize a search of all persons on the premises . . . .”<sup>115</sup> Alito further reasoned that even if the warrant did not authorize a search of the girl, “a reasonable officer certainly could have believed that it did,” and, therefore, the officers were entitled to qualified immunity.<sup>116</sup>

Overall, Justice Alito’s Fourth Amendment jurisprudence exhibits some disturbing trends for those who hold personal privacy as sacrosanct. Cases such as *Stiver* and *Baker* illustrate Justice Alito’s willingness to stretch the scope of warrants through legal reasoning to justify highly suspect law enforcement activities. As demonstrated in *Hodge* and the *Zimmerman* dissents, Alito would further weaken the warrant requirement of the Fourth Amendment by allowing magistrates to defer to law enforcement expertise in issuing warrants, thereby reducing the role of the judiciary as a gatekeeper of Fourth Amendment rights. In addition, by broadly construing the exceptions to the Fourth Amendment and the doctrine of qualified immunity, Alito will render Fourth Amendment protections largely illusory. Already, in *Bolden* and *Lee*, Alito has expanded the circumstances in which a third party may consent to a warrantless search. In addition, in *Leveto* and *Doe*, Alito departed from settled jurisprudence in arguing for qualified immunity for officers who violate clearly established Fourth Amendment principles. All of these cases indicate that while serving on the Supreme Court, Justice Alito will endeavor to shift the balance in Fourth Amendment

jurisprudence in favor of law enforcement goals—a broad societal interest—while limiting individual liberty, which is an interest of the minority.

## II. FIFTH AMENDMENT

The Fifth Amendment is also a major component in the right to privacy. It protects a person from being “compelled in any criminal case to be a witness against himself.”<sup>117</sup> This right to be free from self-incrimination has become so important to the individual’s protection and to the truth-seeking function of the court that police now give a warning to suspected criminal defendants of this right to remain silent.<sup>118</sup> The *Miranda* warning, of course, alerts a suspected criminal defendant to his right to remain silent and to the fact that anything he says can be used against him. It also alerts him to his right to consult with an attorney and to have his attorney present during questioning.<sup>119</sup> Ideally, the warning is designed as a prophylactic to safeguard the Fifth Amendment right against self-incrimination, but the right can be waived.<sup>120</sup> The warning should prevent police violations of the suspect’s right to be free from implicating himself in a crime through what he might be forced to say, because he has just been told that he is free to say nothing.

Justice Alito has addressed these aspects of the Fifth Amendment right to remain silent in a handful of cases. These cases reveal that, as a justice, he will weaken the Fifth Amendment right to be free from self-incrimination, he will seek to restrict the prophylactic usefulness of *Miranda* warnings, and he will lower the safeguards of the Fifth Amendment right to counsel in “right to remain silent” cases.

### *A. Justice Alito Will Weaken the Fifth Amendment Right To Be Free from Self-Incrimination.*

The right to remain silent is a quintessential expression of the privacy right. To keep private the contents of one’s mind is reflected in the Fifth

Amendment's right to be free from self-incrimination.<sup>121</sup> The rationale for honoring this right is to avoid coercion. If a criminal defendant in custody is coerced into making a "confession," then unreliable confessions will inevitably result; it would therefore be forever uncertain whether the defendant's will was overborne through the coercion and whether the defendant was speaking the truth when he "confessed."<sup>122</sup> Thus, the Fifth Amendment right to be free from self-incrimination, served by the prophylactic *Miranda* rule, uses the privacy right to advance the truth-seeking process as well as to protect the individual should they be coerced. After indictment, the right to assistance of counsel attaches and any incriminating statements made in the absence of counsel are excluded from evidence;<sup>123</sup> the assumption being, of course, that if a defendant confesses with his or her attorney's advice, it will not be involuntary or coerced.

Then-Judge Alito eroded the Fifth Amendment right to remain silent in *U.S. v. Balter*.<sup>124</sup> Although the issue was the use of the defendant's silence after arrest and after receiving *Miranda* warnings for impeachment purposes,<sup>125</sup> Alito commented on the length of such exercise of the right to remain silent.<sup>126</sup> In *Balter*, the police gave the defendant, DeJesus, his *Miranda* warnings. At first, DeJesus gave only routine biographical information but did not comment on his alleged offenses.<sup>127</sup> Two days later, he telephoned the arresting officer and tried to make a deal, using a story that made himself the driver but not the triggerman for the alleged crime.<sup>128</sup> Alito thought that two days of silence by DeJesus could be justified by DeJesus' reliance on the belief, engendered by the warnings, that his silence could not be used against him.<sup>129</sup> Even so, Alito concluded that even if the prosecution was in error when it commented on DeJesus' post-arrest silence for the purpose of impeaching a subsequent exculpatory statement in its case in chief, it was harmless error given the overwhelming evidence admitted against DeJesus at trial.<sup>130</sup>

However, in dicta, Alito went further and noted that "[i]t may be that a defendant's silence immediately after receiving *Miranda* warnings is more

likely to represent the exercise of *Miranda* rights than is a defendant's silence for an extended period after the receipt of warnings."<sup>131</sup> Bear in mind that the use of a defendant's silence—at the time of arrest and after receiving *Miranda* warnings—violates the Due Process clause when used for impeachment purposes.<sup>132</sup> Thus, by opening the door to allowing prosecutors to make such comments on silences longer than two days, Alito is narrowing the scope of the Fifth Amendment right in a way quite unexpected by the nature of the right itself. According to Alito, the longer one exercises the right to remain silent, the more likely one is to have that silence used against him or her. This analysis chisels apart the privacy right in the Fifth Amendment by making it more costly to exercise the right when one needs it the most. A defendant exercising this Fifth Amendment right for an extended period of time before reaching Justice Alito's court will need a strong argument, because his or her silence will be held to a higher standard.<sup>133</sup> Such Fifth Amendment dictum illustrates, again, Justice Alito's bias in favor of law enforcement institutions over individual privacy interests.

Alito's decision in *Reardon v. Hendricks*<sup>134</sup> also illustrates that he upholds institutional preferences over individual rights. In *Reardon*, Alito applied the voluntariness standard of *Schneckloth v. Bustamonte*<sup>135</sup> to an alcoholic who traded his confession for a bottle of gin.<sup>136</sup> The *Schneckloth* Court adopted a totality of the circumstances approach to determine whether the defendant's confession was the product of interrogation that had overborne the defendant's will.<sup>137</sup> All Alito could say regarding the voluntariness of the alcoholic's confession was that "clearly established law forecloses us from assigning controlling weight to Reardon's alcoholism."<sup>138</sup> Alito did not discuss whether other factors, in combination with alcoholism, might have justified a contrary holding if the totality of the circumstances had been examined, rather than the single factor of the defendant's alcoholism. This illustrates again that Justice Alito will not

move the Court toward broader interpretation of individual rights when it comes to individual rights.

*B. Justice Alito Will Seek To Restrict the Prophylactic Usefulness of Miranda Warnings by Rejecting the Use of the Fruit of the Poisonous Tree Doctrine.*

The “fruit of the poisonous tree” doctrine, growing out of the Fourth Amendment, limits the admissibility of any governmental evidence that has been gained by an illegal search or seizure, among other things. To have the evidence admitted, the government must argue that the causal relationship between the primary illegality and the evidence obtained thereby is so attenuated as to purge the latter of the taint. As the Supreme Court began importing the “fruit of the poisonous tree” doctrine into Fifth Amendment analysis as applied to statements, some defendants argued that the doctrine should be applied when earlier, unwarned statements tainted later statements such that the later statements were “fruit of the poisonous tree” as well and should be excluded from evidence.<sup>139</sup> This was known as the “cat out of the bag” theory.<sup>140</sup>

In *U.S. v. Tyler*, then-judge Alito concurred with the majority of a Third Circuit panel, which voted to expand the type of *Miranda* violation it will consider when deciding the application of the fruit of the poisonous tree doctrine in the Sixth<sup>141</sup> Amendment context.<sup>142</sup> In *Tyler*, a Mirandized defendant initially refused to make a statement.<sup>143</sup> A short time later, he was taken to a different police station and a police officer engaged him in discussion.<sup>144</sup> Following this reinitiation, less than an hour later the defendant began to cry, was re-Mirandized, and made an inculpatory statement.<sup>145</sup> Eleven days later, still in custody, the police repeated *Miranda* warnings, Tyler acknowledged them, orally waived his rights, and made another inculpatory statement.<sup>146</sup>

The issue between Alito and the majority was the analysis that should be applied when a prior *Miranda* violation is alleged to taint a subsequent

Mirandized statement.<sup>147</sup> In this case, police failed to scrupulously honor a defendant's right to cut off questioning.<sup>148</sup> Both the majority and Alito agreed that the taint of an unconstitutionally obtained statement may not always be attenuated by *Miranda* warnings. However, Alito took it further, pointing out that "the rule is inapplicable when the initial illegality consists of a violation of the *Miranda* prophylactic rule."<sup>149</sup> Apparently, Alito does not view the officers' failure to scrupulously honor a defendant's Sixth Amendment right to counsel as the primary problem, but recasts the issue as the officers' failure to scrupulously honor a *Miranda* invocation.<sup>150</sup> He reasoned that the violation in *Tyler* was not a procedural violation, as was at issue in *Elstad*,<sup>151</sup> in which the officer neglected to give the warning. In contrast, in *Tyler*, the officers violated *Miranda* after the right was invoked.<sup>152</sup> To Alito, this difference does not appear to matter,<sup>153</sup> and makes it appear that he denies privacy rights by strictly adhering to questionable precedent.

*C. Justice Alito Will Likely Lower the Safeguards of the Fifth Amendment Right to Counsel.*

The Fifth Amendment right to counsel is a chief safeguard of the Fifth Amendment right to remain silent and is therefore an important protection of an individual's privacy interests. The *Miranda* rule requires that once an accused has invoked his right to have counsel present during custodial interrogation, police officers must scrupulously honor that right to cut off questioning.<sup>154</sup> Unlike the right to remain silent, once the right to counsel is invoked, it cannot be waived merely by an accused's responses to further police-initiated custodial interrogation, even if the accused has been re-Mirandized.<sup>155</sup> When an accused has expressed his or her desire to deal with officers only through counsel, they cannot be subject to further interrogation by the authorities until counsel has been made available to them, unless the accused reinitiates communication with the police.<sup>156</sup>

Justice Alito's past decisions imply that he would put the burden on the defendant to request an attorney for each fresh interrogation, thus weakening this constitutional safeguard. For example, in *Flamer v. Delaware*,<sup>157</sup> Flamer and another man, both suspected in a double murder investigation, blamed each other for the crime.<sup>158</sup> The police read *Miranda* warnings to Flamer several times during the interrogation and, each time, he waived his right to an attorney.<sup>159</sup> Flamer did not request an attorney until arraignment.<sup>160</sup> After that request, but before actually consulting an attorney, Flamer confessed.<sup>161</sup> Alito, writing for the court, held that merely requesting an attorney at arraignment was insufficient to constitute a request for an attorney in connection with future custodial interrogation.<sup>162</sup> This holding departs from the Supreme Court's holding in *Edwards* that police may not reengage the defendant in questioning once the defendant has requested counsel and until counsel is made available.<sup>163</sup> For Alito, requesting an attorney at an arraignment or bail hearing is not the same as requesting an attorney in connection with future custodial interrogation.<sup>164</sup> Under *Flamer*, police can simply jail people and play a game of reinvocation every time they question an accused. This contravenes the well-established duty to scrupulously observe an accused's right to counsel.<sup>165</sup>

### III. SIXTH AMENDMENT

The Sixth Amendment's counsel clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense."<sup>166</sup> Cases such as *Wheat v. United States* and *Powell v. Alabama* established that a defendant who pays for counsel may choose who that counsel will be.<sup>167</sup>



*A. Justice Alito Will Make Unworkable Distinctions in the Sixth Amendment Right to Counsel.*

In *United States v. Gonzalez-Lopez*, one of the final decisions of the 2005 term, the Court decided that the Sixth Amendment encompasses the right of a criminal defendant to have the counsel of his choice—not merely the assistance that such counsel would provide.<sup>168</sup> In other words, lawyers are not fungible, and a defendant’s choice of counsel is so fundamental to the trial process that any wrongful denial of a defendant’s first choice of lawyers warrants a *per se* reversal.<sup>169</sup> In the 5-4 decision, with Justice Scalia writing for a rare majority that included the four liberal members, the Court reasoned that what the Sixth Amendment provides is not that a trial be fair,<sup>170</sup> but that “a particular guarantee of fairness be provided...that the accused be defended by the counsel he believes to be best.”<sup>171</sup> Contrary to the government’s claim, no showing of prejudice is required; the right is violated when counsel is erroneously deprived.<sup>172</sup> Such right is part of the “root meaning” of the Sixth Amendment.<sup>173</sup> Furthermore, such denial is not subject to harmless-error analysis, but instead is a structural defect in the trial itself.<sup>174</sup>

The facts make this clear. A Missouri federal magistrate judge refused to allow Gonzalez-Lopez’s first choice of counsel, Attorney Low, to represent him on drug-trafficking charges.<sup>175</sup> Low, a California lawyer who was awaiting *pro hac vice* admission in Missouri, had improperly passed notes to Gonzalez-Lopez’s Missouri lawyer during the evidentiary hearing—a violation of a local court rule, according to the judge, who barred Low from further proceedings in the case.<sup>176</sup> Gonzalez-Lopez then hired a St. Louis lawyer who subsequently lost his case.<sup>177</sup> The Eighth Circuit overturned the conviction, ruling that the judge’s improper exclusion of Low amounted to a structural defect that warranted automatic reversal of the conviction.<sup>178</sup>

Writing for the dissent, Justice Alito would require a criminal defendant to make at least some showing that the trial court’s erroneous ruling adversely affected the quality of assistance that the defendant received.<sup>179</sup>

That is because what the Sixth Amendment protects is the “Assistance” that such counsel is able to provide; it is not the lawyer, but the lawyering, that the Sixth Amendment protects.<sup>180</sup> In other words, in Justice Alito’s view, lawyers *are* fungible. This distinction between the lawyer and the legal advice is simply artificial and impractical. Alito seems to think there is this thing out there called “legal advice,” disembodied from the lawyer giving it. Although he argues that the text of the Sixth Amendment supports his interpretation (“Assistance”),<sup>181</sup> it is doubtful that the Framers had such a distinction in mind. The difference between Alito and the majority is that Scalia focuses on the autonomy of the defendant to choose whomever he or she will choose, whereas Alito focuses on whether the “Assistance” was effective—regardless of who provided it—and whether such assistance prejudiced the defendant. Such disrespect of an individual’s choice is not surprising when one examines Justice Alito’s other privacy decisions.

#### IV. OTHER PRIVACY CASES

One of the most controversial, yet also most important, individual rights is the liberty interest in privacy. While this right is not expressly conveyed in the Bill of Rights, the Supreme Court identified it and applied it in *Griswold v. Connecticut*.<sup>182</sup> Justice Douglas, writing for the majority, explained as follows:

[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one . . . . The Third Amendment in its prohibition against the quartering of soldiers “in any house” in time of peace without consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.

The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>183</sup>

Thus, privacy is a liberty implied by the express rights guaranteed in the First, Third, Fourth, and Fifth Amendments. This liberty interest is protected through the due process clauses of the Fifth and Fourteenth Amendments.<sup>184</sup>

*A. Justice Alito’s Decisions Imply He Will Weaken the Privacy Right Regarding Women’s Reproductive Rights.*

The right of a woman to elect to undergo an abortion is founded on the right to privacy.<sup>185</sup> The Supreme Court, in *Roe v. Wade*,<sup>186</sup> stated that there is a fundamental right to privacy that includes “the right of the *individual*, married or single, to be free from unwarranted government intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>187</sup> This right to privacy, a protected liberty interest, is “broad enough to encompass a woman’s decision to terminate her pregnancy.”<sup>188</sup> Thus, if the right of a woman to elect an abortion is picked apart, the Supreme Court’s articulation of the right to privacy is further eroded as well. Justice Alito’s previous treatment of reproductive rights serves as a strong indicator that he will favor institutional interests over the individual liberty interest in privacy.

Justice Alito never wrote the majority opinion in the three reproductive-rights cases he heard while on the Third Circuit.<sup>189</sup> His concurring argument in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>190</sup> was expressly rejected by the Supreme Court on review.<sup>191</sup> Since then, however, Alito concurred in *Planned Parenthood of Central New Jersey v. Farmer*,<sup>192</sup> in which the Third Circuit, following *Casey*, affirmed that a state statute regulating partial-birth abortion is unconstitutional because it constitutes an undue burden if it lacks an exception for performing an abortion to preserve the health of the mother.<sup>193</sup> Alito concurred only in the

result; he would have held that the case was entirely controlled by *Stenberg v. Carhart*,<sup>194</sup> which decided the constitutionality of a similar Nebraska statute and thus did not require the analysis in which the majority engaged.<sup>195</sup> These opinions further demonstrate Justice Alito's willingness to forego individual privacy rights in favor of institutional interests.

*B. Justice Alito Will Restrict Reproductive Privacy Rights by Making the Undue Burden Test More Restrictive, Thus Allowing Coercion of a Woman into Revealing Private Information in Exchange for an Abortion.*

Justice Alito will restrict reproductive privacy rights by taking advantage of the undue burden test's inherent flexibility and malleability. Following Justice O'Connor's concurring lead in *Hodgson v. Minnesota*,<sup>196</sup> the Third Circuit in *Casey* applied the rule that if a statute regulating abortion does not impose an undue burden, the statute need only meet the rational relationship test to pass constitutional muster; otherwise, if there is an undue burden, strict scrutiny applies.<sup>197</sup> Under this test, the majority held that a spousal-notification provision of a state law regulating abortion was an undue burden on a woman's abortion decision and did not serve a compelling state interest.<sup>198</sup> Justice Alito disagreed on this point, arguing that because only a few women suffer from the spousal notification provision, the provision is not unduly burdensome to women as a whole.<sup>199</sup> Thus, Alito would have held that the spousal notification provision did not impose an undue burden; he would have analyzed the spousal notification provision under the rational relationship test,<sup>200</sup> and he would have held that the provision serves the legitimate interest in furthering the husband's interest in the fetus.<sup>201</sup>

The analytical path that Justice Alito traced in his *Casey* concurrence represents an attack on the privacy right. His reading of Justice O'Connor's abortion decisions led him to conclude that "an undue burden may not be established simply by showing that a law will have a heavy impact on a few women but that instead a broader inhibiting effect must be shown."<sup>202</sup>

Alito's approach was opposite to that of the majority, which centered the undue burden analysis on the degree of restriction an affected woman might experience, and not on whether the adversely affected group is a small fraction of the number of women who might seek an abortion.<sup>203</sup> Alito's reverse balancing in *Casey* implies that he would find a woman's right to privacy outweighed by a husband's interest in the fetus or a societal interest in preventing abortions.<sup>204</sup>

The Supreme Court reviewed *Casey* and affirmed the Third Circuit majority's reasoning.<sup>205</sup> The Court held that the proper focus of constitutional inquiry was the group for whom the law was a restriction, not the group for whom the law was irrelevant.<sup>206</sup> Considering the women for whom the statute is relevant, the Court held that the spousal notification provision would be a substantial obstacle to those women's choices to undergo abortions.<sup>207</sup> Thus, Justice O'Connor wrote the plurality opinion voiding the spousal-notification provision as being unconstitutional.<sup>208</sup> In doing so, O'Connor protected an individual woman's interest in privacy. Alito, on the other hand, had argued to diminish the role that coercion might have on a woman's choice to abort, thus ignoring any coercion that individuals within a protected group might undergo.

As in the Fifth Amendment context, Alito's opinion in *Casey* illustrates that he does not see coercion in this context to be a burden large enough to trigger a constitutional violation. Justice Alito pointed out in his *Casey* concurrence that a woman under a spousal-notification regime can have an abortion so long as she reveals her private decision to her husband.<sup>209</sup> While a father unquestionably has an interest in his unborn offspring,<sup>210</sup> O'Connor's plurality recognized that, in certain circumstances, the cost on the mother of notifying her spouse might be prohibitive. Such reasoning implies that the spousal notification requirement might have a coercive effect on a woman's right to choose to abort. Essentially, a pregnant woman who does not want to carry to term would be made to pass a

gauntlet, where she must offer her privacy right in exchange for passage. Once again we see the trading in rights that is an Alito favorite.

## V. CONCLUSION

If our civilization is to be judged by its treatment of minorities, we should be wary of Justice Alito's confirmation to the Supreme Court.<sup>211</sup> The Constitution protects privacy through the Fourth Amendment's prohibition on unreasonable searches and seizures and the warrant requirement, the Fifth Amendment's protection against self-incrimination, and the Fifth and Fourteenth Amendments' protection of liberty in their due process clauses. Our analysis of Justice Alito's Third Circuit opinions indicates that he will weaken the constitutional protection of privacy for individuals in each of these areas. Such erosion of privacy rights represents a shift of the Court's emphasis from individual protections to institutional concerns.

At the end of a report Alito helped write as a senior at Princeton University in 1971, he recognized that "[t]he erosion of privacy, unlike war, economic bad times, or domestic unrest, does not jump to the citizen's attention . . . . But by the time privacy is seriously compromised, it is too late to clamor for reform."<sup>212</sup> Ironically, it may be Justice Alito's confirmation onto the Court that finally signals that our right to privacy is irreversibly compromised.

---

<sup>1</sup> Attorney, Portland, Oregon; J.D., Seattle University School of Law, 2005; M.A., Fuller Theological Seminary, 1986; B.A., North Central University, 1983. My thanks to Professor Christian Halliburton for first lighting the fire in me to explore the right to privacy. And to President George W. Bush and his administration for fanning the flame.

<sup>2</sup> Associate, Earthjustice, Seattle, Washington; Law Clerk, Washington State Supreme Court, 2005-2006; J.D., Seattle University School of Law, 2005; B.A., University of California at Santa Cruz, 2002. The views expressed herein are my own and should not be ascribed to my employer or clients.

<sup>3</sup> U.S. CONST. art. III, § 2.

<sup>4</sup> As Alexander Hamilton explained,

[I]ndependence of the judges is . . . requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community . . . . [I]t is not to be inferred . . . that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. . . . But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. . . . Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to would soon be called for by the voice of the very factions whose misrule had proved the necessity introduce in its stead universal distrust and distress.

THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>5</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

<sup>6</sup> The White House, President Nominates Judge Samuel A. Alito as Supreme Court Justice (Oct. 31, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/10/20051031.html>.

<sup>7</sup> The White House, President Congratulates Judge Alito on Senate Confirmation (Jan. 31, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/10/20061031.html>.

<sup>8</sup> *See, e.g.*, *Gutter v. Bollinger*, 539 U.S. 306 (2003); *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>9</sup> *Hearing on Judge Samuel Alito's Nomination to the Supreme Court Before the S. Judiciary Comm.*, 109th Cong. 28 (2006) [hereinafter *Alito Hearing*] (testimony of Judge Alito).

<sup>10</sup> *Alito Hearing*, *supra* note 9 (testimony of Prof. Goodwin Liu).

<sup>11</sup> *Supra* note 6.

<sup>12</sup> Prior to Alito's hearing, legal scholar Cass Sunstein warned Senator Ted Kennedy that "[w]hen there is a conflict between institutions and individual rights, Judge Alito's dissenting opinions argue against individual rights 84% of the time." Letter from Cass R. Sunstein, Karl N. Llewellyn Distinguished Service Prof. of Juris., to Edward M. Kennedy, U. S. Sen., *An Analysis of Alito's Dissents*, Univ. of Chicago Law School (Dec. 29, 2005), *available at* <http://www.tedkennedy.com/content/571/an-analysis-of-alitos-dissents>.

<sup>13</sup> But for a statewide referendum that overturned South Dakota's abortion ban, see Monica Davey, *South Dakota Bans Abortion, Setting Up Battle*, N.Y. Times, Mar. 7, 2006, at A14. The United States Supreme Court was expected to grant certiorari to Planned Parenthood's challenge to the South Dakota ban. Compare S.D. CODIFIED LAWS § 22-17-5.1 (Michie 2006) ("Any person who administers to any pregnant female or who prescribes or procures for any pregnant female any medicine, drug, or substance or uses or employs any instrument or other means with intent thereby to procure an abortion, unless there is appropriate and reasonable medical judgment that performance of an abortion is *necessary to preserve the life of the pregnant female*, is guilty of a Class 6 felony.") (emphasis added) with *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961, 967 (2006) ("[O]ur precedents hold, that a State may not restrict access to abortions that are 'necessary, in appropriate medical judgment, for preservation of the *life or health of the mother*.'" (quoting *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 879 (1992))) (emphasis added).

<sup>14</sup> It is probable that the Supreme Court will eventually review a constitutional challenge to the federal Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (1996) (defining "marriage" as "only a legal union between one man and one woman as husband and wife . . ."). Indeed, there are currently at least two appealable DOMA decisions. See, e.g., *Smelt v. County of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005).

<sup>15</sup> In fact, the Supreme Court recently decided a case involving the treatment of prisoners captured during prosecution of the "war on terror." See *Hamdan v. Rumsfeld*, 548 U.S. \_\_\_, 126 S.Ct. 2749 (2006).

<sup>16</sup> Two parallel cases have recently been filed in federal district courts challenging the Bush Administration's use of warrantless electronic eavesdropping. See Eric Lichtblau, *Two Groups Planning to Sue over Federal Eavesdropping*, N.Y. Times, Jan. 17, 2006, at A14. In the first, the district court found that the Bush Administration's warrantless wiretapping program was implemented "obviously in violation of the Fourth Amendment." *A.C.L.U. v. National Security Agency*, 438 F. Supp. 2d 754, 775 (E.D. Mich. 2006). The *A.C.L.U.* court further found that the wiretapping program violated the APA, the Separation of Powers doctrine, the First Amendment, and statutory law, and, accordingly, permanently enjoined the program. *Id.* at 782. However, the Sixth Circuit stayed the injunction pending appeal. *A.C.L.U. v. National Security Agency*, 467 F.3d 590 (6th Cir. Oct 04, 2006). In the second case, *Center for Constitutional Rights v. Bush*, No. 06-313 (S.D.N.Y. filed Jan. 17, 2006), oral arguments supporting summary judgment motions occurred on September 5, 2006.

<sup>17</sup> Just. Samuel A. Alito, Jr.—Biography, <http://www.whitehouse.gov/infocus/judicialnominees/alito.html>.

<sup>18</sup> *Id.*

<sup>19</sup> In the confirmation hearings, Alito recognized that "an advocate has the goal of achieving the result that the client wants within the bounds of professional responsibility. . . . That's what an advocate is supposed to do. And that's what I attempted to do during my years as an advocate for the federal government." *Alito Hearing*, *supra* note 9.

<sup>20</sup> U.S. CONST. amend. IV.

<sup>21</sup> *United States v. Stiver*, 9 F.3d 298 (3d Cir. 1993).



<sup>22</sup> *Id.* at 302-03.

<sup>23</sup> *Id.* (internal citations and footnotes omitted) (brackets in original).

<sup>24</sup> The DEA provides the following definition for “drug paraphernalia”:

Drug paraphernalia is any legitimate equipment, product, or material that is modified for making, using, or concealing illegal drugs such as cocaine, heroin, marijuana, and methamphetamine. Drug paraphernalia generally falls into two categories: . . . *User-specific products* are marketed to drug users to assist them in taking or concealing illegal drugs. These products include certain pipes, smoking masks, bongos, cocaine freebase kits, marijuana grow kits, roach clips, and items such as hollowed out cosmetic cases or fake pagers used to conceal illegal drugs. *Dealer-specific products* are used by drug traffickers for preparing illegal drugs for distribution at the street level. Items such as scales, vials, and baggies fall into this category.

U.S. Drug Enforcement Admin., *Drug Paraphernalia*, <http://www.dea.gov/ongoing/pipedreams.html> (last visited on Oct. 22, 2006).

<sup>25</sup> As Alito himself has recognized, courts have a duty to interpret warrants in a commonsense manner and not hypertechnically. *See, e.g., Doe v. Groody*, 361 F.3d 232, 247 (3d Cir. 2004) (Alito, J., dissenting).

<sup>26</sup> *Baker v. Monroe Township*, 50 F.3d 1186, 1195-1203 (3d Cir. 1995) (Alito, J., dissenting).

<sup>27</sup> *Id.* at 1188 (majority opinion).

<sup>28</sup> *Id.* at 1188-89.

<sup>29</sup> *Id.* at 1189.

<sup>30</sup> *Id.* at 1197 (Alito, J., dissenting).

<sup>31</sup> *Id.* at 1189 (majority opinion).

<sup>32</sup> *United States v. Hodge*, 246 F.3d 301, 303 (3d Cir. 2001).

<sup>33</sup> *Id.* at 303-04.

<sup>34</sup> *Id.* at 304.

<sup>35</sup> *Id.* at 304-05.

<sup>36</sup> *Id.* at 306.

<sup>37</sup> *Id.* (internal citations omitted).

<sup>38</sup> *United States v. Zimmerman*, 277 F.3d 426, 438-41 (3d Cir. 2002) (Alito, J., dissenting).

<sup>39</sup> *Id.* at 429 (majority opinion).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 440 (Alito, J., dissenting).

<sup>42</sup> *Id.*

<sup>43</sup> For example, in *United States v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars and Fifty-Seven Cents*, 307 F.3d 137, 148-49 (3d Cir. 2002), Justice Alito recognized that

[t]he Fourth Amendment does not prohibit searches for long lists of documents or other items provided that there is probable cause for each item on the list and that each item is particularly described. . . . [E]xamples of general warrants are those

authorizing searches for and seizures of such vague categories of items as . . .  
“obscene materials” . . .

The comparison of Alito’s analysis in *Ninety-Two Thousand* with his analysis in both *Hodge* and his *Zimmerman* dissent illustrate Alito’s willingness to apply the malleable Fourth Amendment standards inconsistently at best and arguably according to an agenda of limiting individual rights in favor of law enforcement interests.

<sup>44</sup> *United States v. Kithcart*, 134 F.3d 529, 529 (3d Cir. 1998).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 530.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 530-31.

<sup>51</sup> *Id.* at 532.

<sup>52</sup> *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

<sup>53</sup> *Id.* at 533 (McKee, J., dissenting).

<sup>54</sup> *Mellott v. Heemer*, 161 F.3d 117 (3d Cir. 1998).

<sup>55</sup> *Id.* at 124.

<sup>56</sup> *See, e.g., United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (“On summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.”).

<sup>57</sup> *Mellott*, 161 F.3d at 124.

<sup>58</sup> *Id.* at 125.

<sup>59</sup> *Id.* at 124-25.

<sup>60</sup> *Id.*

<sup>61</sup> *Bolden v. Se. Pa. Transp. Auth.*, 953 F.2d 807 (3d Cir. 1991).

<sup>62</sup> *Id.* at 809.

<sup>63</sup> *Id.* at 823.

<sup>64</sup> *Id.* at 826.

<sup>65</sup> *Id.* at 828.

<sup>66</sup> *Id.* at 827.

<sup>67</sup> *Id.* at 833 (Nygaard, J., dissenting).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 834.

<sup>70</sup> *Id.* at 837 (emphasis added).

<sup>71</sup> *United States v. Lee*, 359 F.3d 194, 199 (3d Cir. 2004).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 203.

<sup>76</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>77</sup> *Lee*, 359 F.3d at 213 (McKee, J., dissenting).

<sup>78</sup> *Katz*, 389 U.S. 347 at 356-357.

<sup>79</sup> *Lee*, 359 F.3d at 215 (McKee, J., dissenting).

- <sup>80</sup> *Id.* at 213.
- <sup>81</sup> *Hudson v. Michigan*, 126 S. Ct. 2159, 2162-63 (2006).
- <sup>82</sup> *Id.* at 2165.
- <sup>83</sup> *Id.* (citations omitted).
- <sup>84</sup> *See id.* at 2167-68.
- <sup>85</sup> *Id.* at 2163, 2168.
- <sup>86</sup> *Id.* at 2171 (Breyer, J., dissenting).
- <sup>87</sup> *Id.* at 2173; *Mapp v. Ohio*, 367 U.S. 643, 653 (1961).
- <sup>88</sup> *Wolf v. Colorado*, 338 U.S. 25 (1949).
- <sup>89</sup> *Mapp*, 367 U.S. at 652.
- <sup>90</sup> *See Hudson*, 126 S. Ct. at 2175.
- <sup>91</sup> *Id.* at 2175 (Breyer, J., dissenting).
- <sup>92</sup> *Id.* at 2177.
- <sup>93</sup> *Id.*
- <sup>94</sup> *See infra* section IV.
- <sup>95</sup> *Leveto v. Lapina*, 258 F.3d 156, 162 (3d Cir. 2001) (quoting *Good v. Dauphin County Soc. Serv. For Children & Youth*, 891 F.2d 1087, 1092 (3d Cir. 1989).
- <sup>96</sup> 42 U.S.C. § 1983 (1979).
- <sup>97</sup> In *Terry*, the Supreme Court held that police may conduct a limited warrantless frisk outside a suspect's clothing if the police have an "articulable suspicion" that the suspect is armed and dangerous. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).
- <sup>98</sup> *Leveto*, 258 F.3d at 159-60.
- <sup>99</sup> *Id.* at 160.
- <sup>100</sup> *Id.* at 164.
- <sup>101</sup> *Id.* at 164-65 (referencing *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979), in which the court held that a person's mere presence at the location where a search is occurring is an insufficient basis to conduct a search of that person).
- <sup>102</sup> *Id.* at 166.
- <sup>103</sup> *Id.*
- <sup>104</sup> *Id.* at 165.
- <sup>105</sup> *Id.* at 166.
- <sup>106</sup> *See Terry v. Ohio*, 392 U.S. 1, 30 (1968).
- <sup>107</sup> *See GOLDFINGER* (United Artists 1965).
- <sup>108</sup> *Doe v. Groody*, 361 F.3d 232, 244-49 (3d Cir. 2004) (Alito, J., dissenting).
- <sup>109</sup> *Id.* at 235 (majority opinion).
- <sup>110</sup> *Id.* at 238-39.
- <sup>111</sup> *Id.* at 239.
- <sup>112</sup> *Id.*
- <sup>113</sup> *Id.* at 241.
- <sup>114</sup> *Id.* at 247 (Alito, J., dissenting).
- <sup>115</sup> *Id.*
- <sup>116</sup> *Id.* at 248.
- <sup>117</sup> U.S. CONST. amend. V.
- <sup>118</sup> *See, e.g., Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966).

<sup>119</sup> The Supreme Court has interpreted the Fifth Amendment right to be free from self-incrimination as including the Sixth Amendment right to counsel. *See, e.g., Massiah v. United States*, 377 U.S. 201 (1964).

<sup>120</sup> *See, e.g., id.*

<sup>121</sup> *See Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

<sup>122</sup> *See, e.g., Bram v. United States*, 168 U.S. 532, 546 (1897) (“But then this confession must be voluntary and without compulsion; for our law in this differs from the civil law, that it will not force any man to accuse himself; and in this we do certainly follow the law of nature, which commands every man to endeavor his own preservation; and therefore pain and force may compel men to confess what is not the truth of facts, and consequently such extorted confessions are not to be depended on.”) (quoting Gilbery, EVIDENCE 140 (2d ed. 1760)).

<sup>123</sup> *See Massiah v. United States*, 377 U.S. 201, 206-07 (1964).

<sup>124</sup> *United States v. Balter*, 91 F.3d 427 (3d Cir. 1996).

<sup>125</sup> *Id.* at 439.

<sup>126</sup> *See id.*

<sup>127</sup> *Id.* at 437.

<sup>128</sup> *Id.* at 438.

<sup>129</sup> *Id.* at 439.

<sup>130</sup> *Id.* at 437-40. The error was harmless because of the “overwhelming evidence” admitted against DeJesus at trial. *Id.* at 440.

<sup>131</sup> The amount of time that had elapsed between warnings and statement—two days—“was not great.” *Id.* at 439. One is left to wonder what would qualify as “great.”

<sup>132</sup> *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). *Doyle* was decided under the Fourteenth Amendment, but “the right recognized in *Doyle* applies to federal prosecutions under the Fifth Amendment.” *See also United States v. Agee*, 597 F.2d 350, 354 n.11 (3d Cir. 1979).

<sup>133</sup> This is a similar trading in rights that we saw in *Bolden*. *See supra* notes 61-70 and accompanying text.

<sup>134</sup> *Reardon v. Hendricks*, 82 F. App’x 273 (2003).

<sup>135</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218 (1991).

<sup>136</sup> When detectives were not satisfied with the defendant’s first story and expressed their dissatisfaction, the defendant asked, “If I tell you the truth, can I have a drink?” The detectives agreed and displayed a bottle of gin to assure the defendant that they were telling the truth. The defendant then divulged the truth, even leading detectives to the body. *Reardon*, 82 Fed. App’x. at 274.

<sup>137</sup> *Id.* at 276.

<sup>138</sup> *Id.*

<sup>139</sup> *See, e.g., Oregon v. Elstad*, 470 U.S. 298, 302 (1985) (articulating defendant Elstad’s argument).

<sup>140</sup> *United States v. Bayer*, 331 U.S. 532, 540-41 (1947).

<sup>141</sup> Though the majority applied the “fruit of the poisonous tree” doctrine under the Sixth Amendment, it occasionally slipped into Fifth Amendment. *See, e.g., United States v. Tyler*, 164 F.3d 150, 156 (3d Cir. 1998).

<sup>142</sup> *Id.* Alito concurred with the majority in reversing the district court's order denying suppression of the statements at issue. The court remanded to determine the validity of the purported Miranda waiver. *Id.* at 159.

<sup>143</sup> *Id.* at 152.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 155.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 162 (Alito, J., concurring).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 152.

<sup>153</sup> Alito starts with whether the Miranda warning is given, because then the defendant has been apprised of his rights and any waiver will be knowing, intelligent, and voluntary. Only after the question of whether a valid waiver has been made does Alito ask whether there are any "unusual circumstances" that gave rise to the waiver. *See id.* at 161.

<sup>154</sup> *Michigan v. Mosley*, 423 U.S. 96, 104 (1975).

<sup>155</sup> *Edwards v. Arizona*, 451 U.S. 477, 484 (1981).

<sup>156</sup> *Id.* at 484-85.

<sup>157</sup> *Flamer v. Delaware*, 68 F.3d 710 (3d Cir. 1995).

<sup>158</sup> *Id.* at 715.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 716.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 727.

<sup>163</sup> *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

<sup>164</sup> *Flamer v. Delaware*, 68 F.3d 710 (3d Cir. 1995).

<sup>165</sup> *Michigan v. Mosley*, 423 U.S. 96, 104 (1975). Alito appears to be saying that this is just the difference between a Sixth Amendment right to counsel and Fifth Amendment right to counsel and that the defendant must invoke each separately.

<sup>166</sup> U.S. CONST. amend. VI.

<sup>167</sup> *See Wheat v. United States*, 486 U.S. 153, 159 (1988); *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

<sup>168</sup> *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2562 (2006).

<sup>169</sup> *Id.* at 2560.

<sup>170</sup> Such is the primary function of the Due Process clauses. *See id.* at 2562.

<sup>171</sup> *Gonzalez-Lopez*, 126 S. Ct. at 2562 (2006).

<sup>172</sup> *Id.* at 2562-63.

<sup>173</sup> *Id.* at 2563.

<sup>174</sup> *Id.* at 2562-65.

<sup>175</sup> *Id.* at 2560.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *See United States v. Gonzalez-Lopez*, 399 F.3d 924 (8th Cir. 2005).

- <sup>179</sup> *Gonzalez-Lopez*, 126 S. Ct. at 2566.
- <sup>180</sup> *Id.*
- <sup>181</sup> *Id.* at 2566-67.
- <sup>182</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).
- <sup>183</sup> *Id.* at 484.
- <sup>184</sup> *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).
- <sup>185</sup> *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Roe v. Wade*, 410 U.S. 113, 153, 169-70 (1973).
- <sup>186</sup> *Roe*, 410 U.S. 113 (1973).
- <sup>187</sup> *Id.* at 169-70 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).
- <sup>188</sup> *Id.* at 153.
- <sup>189</sup> *Planned Parenthood of Se. Penn. v. Casey*, 947 F.2d 682 (3d Cir. 1991); *Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127 (3d Cir. 1999); *Elizabeth Blackwell Health Center for Women v. Knoll*, 61 F.3d 170 (3d Cir. 1995).
- <sup>190</sup> *Casey*, 947 F.2d 682 (3d Cir. 1991).
- <sup>191</sup> *Compare* *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 879 (holding the spousal notification provision to be an undue burden on a woman's choice) *with* *Planned Parenthood of Se. Penn. v. Casey*, 947 F.2d 682, 720 (3d Cir. 1991).
- <sup>192</sup> *Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127 (3d Cir. 1999).
- <sup>193</sup> *Id.* at 145-46.
- <sup>194</sup> *Stenberg v. Carhart*, 530 U.S. 914 (2000).
- <sup>195</sup> *Farmer*, 220 F.3d at 152 (Alito, J., concurring).
- <sup>196</sup> *Hodgson v. Minnesota*, 497 U.S. 417 (1990).
- <sup>197</sup> *Planned Parenthood of Se. Penn. v. Casey*, 947 F.2d 682, 698 (3d Cir. 1991).
- <sup>198</sup> *Id.* at 715.
- <sup>199</sup> *Id.* at 721 (Alito, J., dissenting) (“[I]t appears clear that an undue burden may not be established simply by showing that a law will have a heavy impact on a few women but that instead a broader inhibiting effect must be shown.”).
- <sup>200</sup> *Id.* at 720 (Alito, J., dissenting).
- <sup>201</sup> *Id.* at 725. The majority would have concurred in this result, had it not applied strict scrutiny. *See id.* at 714.
- <sup>202</sup> *Id.* at 721 (Alito, J., dissenting).
- <sup>203</sup> *Id.* at 691, n.4.
- <sup>204</sup> *See id.* at 725 (Alito, J., dissenting).
- <sup>205</sup> *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992).
- <sup>206</sup> *Id.* at 894.
- <sup>207</sup> *Id.*
- <sup>208</sup> *Id.* at 895.
- <sup>209</sup> *Planned Parenthood of Se. Penn. v. Casey*, 947 F.2d 682, 722 (3d Cir. 1991) (Alito, J., dissenting).
- <sup>210</sup> *See, e.g., id.* at 725.
- <sup>211</sup> LOUIS FISHER, *THE LIFE OF MAHATMA GANDHI, PART II*, 424 (Harper & Row, 1983) (1950).

<sup>212</sup> Samuel J. Alito, Jr., *The Boundaries of Privacy in American Society*, 1 WOODROW WILSON SCH. OF PUB. & INT'L AFF. 1 (1971), available at [http://www.boston.com/news/nation/washington/articles/2005/11/02/alito\\_writing\\_backed\\_privacy\\_gay\\_rights/](http://www.boston.com/news/nation/washington/articles/2005/11/02/alito_writing_backed_privacy_gay_rights/).